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No. 81-469

IN THE

Supreme Court of the United States

October Term, 1982

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF PETITIONER BUSH

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QUESTIONS PRESENTED

1. Whether the federal employment relationship is a "special factor" militating against an implied right of action for damages against federal officials who have intentionally violated the constitutional rights of federal employees.

2. Whether the civil service remedies available to federal employees for violations of their rights under federal employment statutes are alternative remedies for *constitutional* violations which Congress has explicitly declared to be a substitute for a *Bivens* remedy and which Congress viewed as equally effective.

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BRIEF OF AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF PETITIONER BUSH

THE INTEREST OF NTEU AS AMICUS CURIAE

The National Treasury Employees Union ("NTEU") is a labor organization representing the interests of federal employees. NTEU has been certified pursuant to the provisions of 5 U.S.C. §§ 7111, 7135(a)(1) as the exclusive bargaining representative of over 120,000 federal employees in various bargaining units, including the Internal Revenue Service, the Customs Service, the Department of Energy, the Federal Communications Commission, the Federal Elections Commission, the Federal Deposit Insurance Corporation, the Bureau of Alcohol, Tobacco, and Firearms the Bureau of Public Debt, the Department of Health and Human Services, the Bureau of Government Financial Obligations, and the Pension Benefit Guaranty Corporation.

NTEU employs a legal staff of approximately forty (40) lawyers who specialize in federal employment issues. For many years, NTEU has vigorously litigated its rights as an organization and the rights of the employees NTEU represents, as well as the rights of all federal employees, *e.g., Parks et al. v. Internal Revenue Service, et al.,* 618 F.2d 677 (10th Cir. 1980) (illegal disclosure of personnel records); *National Treasury Employees Union v. Campbell,* 589 F.2d 669 D.C. Cir. 1978) (excessive health insurance rates for federal employees); *National Treasury Employees Union v. Nixon,* 492 F.2d 587 (D.C. Cir. 1974) (illegal withholding of employee pay raises).

NTEU files this brief as *amicus curiae* because of the significant impact the Court's decision will have on the ability of all federal employees to protect their constitutional rights in a meaningful fashion. The Fifth Circuit has ruled that Bush, solely because he is a federal employee, cannot sue the federal official who has intentionally violated his First Amendment right to free speech. Should this Court allow that decision to stand, the fundamental liberties of all federal employees will be less secure and more susceptible to intentional abuse.

For these reasons, NTEU and its members have a substantial interest in the outcome of this controversy. Both the petitioner, through his attorney, and the respondent, through the Solicitor General, have consented to the filing of NTEU's brief in this case.

SUMMARY OF ARGUMENT

The lower court reached an erroneous result in this case because it misinterpreted and misapplied the principles of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and its progeny. Although the lower court held the federal employment

relationship to be a "special factor" counseling hesitation in allowing a *Bivens* remedy, its decision relied almost exclusively on the assumed availability of statutory civil service remedies as an alternative to a *Bivens* action. The court below thus merged the two distinct limitations on *Bivens* actions established by this Court, one pertaining to "special factors" and the other pertaining to statutory alternatives, into a single, hybrid limitation in which a statute may constitute a "special factor." As a result, the court below applied a significantly less demanding standard of adequacy to those statutory alternatives than this Court has required when the constitutional liberties vindicated by a *Bivens* remedy are at stake.

The federal employment relationship is not a "special factor counseling hesitation," as this Court has applied that term. Nor can it be said that Congress has provided an alternative remedy for *constitutional* violations which it explicitly meant to be a substitute for a *Bivens* cause of action and which it viewed as equally effective. Congress has made no such explicit, or even implicit, declaration; and it cannot be maintained, in light of this Court's decisions, that any civil service remedy is as effective, as a means of either redress or deterrence, as a *Bivens* remedy against individual wrongdoers. Moreover, the burden of showing special factors or congressional intent to preempt a *Bivens* cause of action has been squarely placed by this Court on the shoulders of those who would avoid liability. It is a burden which cannot be met in this case, since no such special factors or congressional intent exists. Further, the lower court failed to recognize that the doctrine of "qualified immunity" would adequately protect the government's interest in efficiency and permit federal employees to seek damages only in genuinely egregious cases of intentional, malicious violations of their constitutional rights.

The principles established by this Court support a *Bivens* cause of action against federal officials who have intentionally invaded the constitutional rights of federal employees. Indeed, those principles do more than merely support such a cause of action, they compel it. None of the limitations on *Bivens* actions articulated by this Court apply to shield federal officials from liability for intentional attacks upon the constitutional rights of federal employees.

The end product of the lower court's errors is the determination that federal employees, alone among all citizens, are prohibited from seeking damages from officials who have intentionally violated their constitutional rights. This Court cannot, consistent with its own decisions, permit that determination to become a part of our fundamental law. For all of the above reasons, the decision of the lower court must be reversed.

ARGUMENT

I. FEDERAL EMPLOYEES WHO HAVE BEEN RETALIATED AGAINST FOR THE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS MAY VINDICATE THOSE RIGHTS IN AN ACTION FOR DAMAGES AGAINST THE OFFENDING OFFICIAL.

A. Introduction

On remand from this Court, the Fifth Circuit, for the second time, has refused to recognize a *Bivens* remedy for a federal employee seeking damages from a superior federal official for violating his First Amendment rights. The court below grounded this result in its holding that the employer-employee relationship in the federal government is a "special factor" which counsels against recognizing a constitutional cause of action. *Bush v. Lucas,* 647 F.2d 573 (1981). It is that employment relationship, said the

court, which distinguishes the instant case from the decisions of this Court holding that citizens may seek damages against government officials who trespass upon their constitutional rights, e.g., *Carlson v. Green,* 446 U.S. 14 (1980); *Davis v. Passman,* 442 U.S. 228 (1979); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

The National Treasury Employees Union, as *amicus curiae,* respectfully submits that the court below erred in holding that federal employees, solely by virtue of their employment status, stand on a different footing from other citizens when seeking recompense for constitutional violations by federal officials. It is true that under the decisions of this Court the speech rights protected by the First Amendment are more limited for federal employees than for other citizens. *See e.g., United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973). Nevertheless, there is no justification in either law or reason for imposing a further disability on federal employees who are punished for expression which clearly falls within the realm of constitutionally protected speech.[1]

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[1]We understand the issue presented here to be whether a federal employee may seek damages for a clear violation of his First Amendments rights, and *not* whether the speech engaged in is protected in the first instance by the First Amendment. This case was disposed of below on defendant's motion for summary judgment. *Bush v. Lucas, supra,* 647 F.2d at 575. The defendant did not argue, and the lower court did not hold, that Bush's speech lay outside the protection of the Constitution. Instead, the lower court assumed the existence of Bush's substantive rights under the First Amendment, but held that the public employer-employee relationship affects "the way in which an *aggrieved* employee can assert and redress his rights in the employment context," *Id.* at 576 (emphasis added).

B. In Refusing To Infer A Constitutional Cause Of Action For Federal Employees, The Court Below Incorrectly Applied The Rule Of *Bivens*, As Reiterated In *Davis v. Passman* and *Carlson v. Green*.

In its seminal decision in *Bivens*, 403 U.S. 388 (1971), this Court recognized an implied constitutional cause of action for damages against federal agents for the infringement of personal liberty guaranteed by the Constitution. Although *Bivens* was the first case which explicitly affirmed the existence of a damage action against federal officials for constitutional torts, the Court noted that such damage actions have deep roots in this nation's jurisprudence. *Id.* at 392, 395-396; *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-180 (1803). These roots were also reflected in the Court's determination that money damages is the appropriate remedy for injuries to rights protected by the Constitution. *Bivens, supra*, 403 U.S. at 395-396.

Bivens concerned the violation of rights secured by the Fourth Amendment. In the years since *Bivens*, however, this Court has recognized implied causes of action under other constitutional provisions which secure our fundamental liberties from governmental abuse. *Davis v. Passman*, 442 U.S. 228, 245-249 (1979) (Fifth Amendment); *Carlson v. Green*, 446 U.S. 14, 17 (1980) (Eighth Amendment). The lower federal courts have similarly recognized implied causes of action to vindicate a broad range of constitutional rights. *Paton v. La Prade*, 524 F.2d 862 (3rd Cir. 1975) (Fourteenth and First Amendments); *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981) (First Amendment); *McAnaw v. Custis*, (D. Kan. Jan. 15,

1982) (unreported) (First Amendment). It is thus clearly established "that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson v. Green, supra,* 446 U.S. at 18.

Since *Bivens,* no decision of this Court has failed to recognize the right to a damage action by one whose constitutional rights have been intentionally violated by a federal official. In *Bivens* and its progeny, however, this Court has established two limitations on the implication of such damage actions for constitutional torts. The first of these limitations applies when the defendants can show the existence of "special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens, supra,* 403 U.S. at 396; *Davis v. Passman, supra,* 442 U.S. at 245: *Carlson v. Green, supra,* 446 U.S. at 18, 19. The second limitation applies "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* (emphasis the Court's). Unless a defendant can show that one of these two limitations applies, the victim of a constitutional infringement by a federal official will be able to redress the injury in damages, a "remedial mechanism normally available in the federal courts." *Davis v. Passman, supra,* 442 U.S. at 248, *quoting Bivens, supra,* 403 U.S. at 397. Neither of these limitations applies in this case.

The court below purported to reach only the "special factors" limitation on *Bivens* actions.[2] It held that "the

[2]The court emphasized that it did not reach the question whether civil service remedies available to Bush and other federal employees were intended by Congress to be a substitute for recovery directly under the Constitution and viewed by Congress as equally effective. *Bush v. Lucas, supra,* 647 F.2d at 577. See discussion *infra* at pp. 12-19.

Government employer-employee relationship in this case is a special factor which counsels hesitation in recognizing a constitutional cause of action in the absence of affirmative action by Congress." *Bush v. Lucas, supra,* 647 F.2d at 577. The court articulated two reasons for so holding: (1) the existence of statutory and administrative remedies for illegal employment practices in the federal service, and (2) the "unique relationship between the Federal Government and its civil service employees." *Id.* at 576. It did not, however, consider these reasons discretely. Instead, it analyzed the "unique" federal employment relationship exclusively in terms of the statutory and administrative structure surrounding that relationship.

This analysis is doubly faulty. First, though masquerading as a "special factor," the statutory scheme is, in reality, the *only* limitation considered by the court. Second, in collapsing the two distinct *Bivens* limitations into the statutory one, the lower court applied a significantly less demanding standard of adequacy to that statutory alternative than this Court has required in *Bivens, Davis,* and *Carlson.*

The Union's argument is that the federal employment relationship is not a "special factor counseling hesitation" in inferring a damage remedy in these circumstances; moreover, when judged by the standards laid down by this Court, the statutory remedies available to federal employees are not an adequate substitute for a *Bivens*-type action. Finally, no public interest is impaired by the result we urge here.

C. The Federal Employment Relationship Is Not A "Special Factor" Militating Against An Implied Right Of Action For Damages Against An Offending Federal Official.

The court below divined in the federal employment relationship a special factor counseling hesitation in inferring a *Bivens* remedy. *Bush v. Lucas,* 647 F.2d at 576. Relying on decisions of this Court, the Fifth Circuit noted the fundamental difference between the federal government as employer and the federal government as sovereign. *Id.* The employment relationship has unquestionably been seen to justify giving the government employer "wide discretion and control over the management of its personnel and internal affairs." *Id., citing Arnett v. Kennedy,* 416 U.S. 134, 168 (1974). With reference to the First Amendment, this Court has manifested its concern for the employer's broad discretion by holding that in certain contexts the speech of federal employees, unlike that of private citizens, is not constitutionally protected. *United Public Workers v. Mitchell,* 330 U.S. 75 (1947); *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) (state employees); *United States v. Snepp,* 444 U.S. 507 (1980). See also *Alfred Knopf Co. v. Colby,* 509 F.2d 1362 (4th Cir. 1975) *cert. denied* 421 U.S. 992 (1975). This Court has never held, however, that federal employees are precluded from vindicating their *recognized* First Amendment rights on the basis of their status as federal employees.

In cases concerning the speech and association rights of public employees, the Court has taken account of the public employment relationship solely in regard to whether the employees possessed the alleged substantive rights protected by the Constitution. *United Public Workers v. Mitchell, supra; Wieman v. Updegraff,* 344

U.S. 183 (1952); *Keyishian v. Board or Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education, 391 U.S. 563 (1968); United States Civil Service Commission v. National Association of Letter Carriers, supra, Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). The Court's approach is well illustrated by Justice White's opinion for the Court in the *Letter Carriers* case. The problems of governmental inefficiency and corruption were considered and given their due weight. *Letter Carriers, supra*, 413 U.S. at 555-556. These problems, however, were considered from the perspective of their impact on the substantive rights of federal employees and the extent to which the First Amendment curtailed Congress' power to limit the speech and association of those who work in the federal service. The Court's conclusion, after consideration of the special relationship between the government and its employees, was that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees." *Id.* at 556. The Court thus held that federal employees, unlike other citizens, do not possess the constitutional right to engage in certain partisan political activities.

The court below, however, went much further. It held that not only are federal employees' substantive rights more limited than those of other persons, but that they possess First Amendment rights which their status as federal employees prevents them from vindicating in the same manner as other persons. *Bush v. Lucas, supra*, 647 F.2d at 576. In so holding, the lower court relied extensively on this Court's decision in *Pickering v. Board of Education, supra*. In *Pickering*, however, the issue before the Court was, as in *Letter Carriers*, the extent to which the First Amendment protects certain forms of speech by public employees. In both cases, the Court's solicitude for

efficient public service dictated some limitation on the extent to which certain forms of speech by public employees are protected by the First Amendment. *Pickering, supra,* 391 U.S. at 568. But in neither *Pickering* nor *Letter Carriers,* nor indeed in any other case, has this Court found the relationship between the government and its employees to be a relevant factor in determining whether public employees may seek redress for their *recognized* and protected First Amendment rights through the normal means for such redress.

Thus, the "special" relationship between the government and its employees is considered when the initial balance is struck between the government's interest as an employer and the citizen's interest in individual expression. The result of this balancing delineates the First Amendment protection accorded to the speech and association of public employees. No decision of this Court, and no valid requirements of public policy, permit the relationship between the government and its employees to be doubly weighted against employees in First Amendment cases, as the lower court has done in this case. The government employer's legitimate concerns, already accounted for, cannot be taken into account a second time in determining whether, for an infringement upon a right found to be constitutionally protected, federal employees are entitled to "the ordinary remedy for an invasion of personal interests in liberty." *Bivens, supra,* 403 U.S. at 395.

The Fifth Circuit purported to find little guidance from this Court in determining whether special factors exist. *Bush v. Lucas,* 647 F.2d at 576. Yet it ignored the guidance which is at hand. Although this Court has not expressly defined the term, it has pointed to several examples of possible "special factors" which might counsel hesitation in inferring damage remedies. None of these examples were given serious treatment by the court below.

For example, political question considerations involving the relationship between the federal bench and a coordinate branch of government might, this Court has said, be a "special factor" militating against a damage action in federal court. *Davis v. Passman, supra,* 442 U.S. at 242, 246; *Carlson v. Green, supra,* 446 U.S. at 18, 19. Where, as in *Davis,* the implication of the right to sue a federal official for a constitutional tort might present conflicts with a constitutional provision or the respect due a coordinate branch of government, caution should be the rule. It cannot sensibly be argued, however, that the defendant in this case, or federal officials as a class, "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson v. Green, supra,* 446 U.S. at 19. See also *Butz v. Economou,* 438 U.S. 478 (1978); *Harlow v. Fitzgerald,* 50 U.S.L.W. 4815 (June 22, 1982) (federal executive officials possess only qualified immunity from civil damage suits based upon constitutional torts).

The Court has also noted that a significant adverse impact on the ability of federal officials to perform their duties might also counsel hesitation. *Id.* In *Carlson,* however, the Court concluded that, as to the defendant prison officials, "even if requiring them to defend respondent's suit might inhibit their official duties, the qualified immunity accorded them under *Butz v. Economou* provides them adequate protection." *Id.* (citations omitted); *see also Harlow v. Fitzgerald, supra,* 50 U.S.L.W. 4815 (June 22, 1982). The same protection is, of course, available here (see discussion *infra,* Point E., pp. 24-29).[3]

[3]The *Bivens* Court mentioned another "special factor": questions of "federal fiscal policy" as exemplified in *United States v. Standard Oil Co.,* 332 U.S. 301 (1947). That factor prevented inferring from the government-soldier relationship a cause of action for damages by the United States against one who negligently injures a soldier. Since Congress could legislate such liability at any time, and was "normally

We do not argue that there are no conceivable circumstances in which special factors might counsel hesitation in the implication of a *Bivens* remedy for *some* federal employees. None of these possible special factors, however, are even remotely present in this case.

In *Jaffee v. United States,* 663 F.2d 1226 (3rd Cir. 1981), the court held that soldiers cannot sue individual federal officials for constitutional torts occurring incident to military service. *Id.* at 1228. In so holding, the *Jaffe* court relied upon the effect that such suits might have upon "military discipline," *id.* at 1236, and the fear that such suits would provide situations when "military orders would be reviewed in a civilian court," *id.* at 1238, which the Supreme Court has found to lack competence in military affairs. See *Rostker v. Goldberg,* 448 U.S. 1306 (1981).

These and other national security considerations might well be legitimate special factors counseling hesitation in *Bivens* contexts. See *United States v. Snepp,* 444 U.S. 507 (1980); *Feres v. United States,* 340 U.S. 135 (1950); *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977); *Kannisto v. City of San Francisco,* 541 F.2d 841 (9th Cir. 1976) *cert. denied* 430 U.S. 931 (1977) (police officers); *Simpson v. Weeks,* 570 F.2d 240 (10th Cir. 1978) *cert. denied* 443 U.S. 911 (1979) (police officers). They have, however, no connection to this case. Nor do these considerations come into play in regard to the general right of federal employees to bring *Bivens* actions. The federal civil service is not based on military discipline. Federal courts are competent to review the constitutionali-

quite solicitous where the federal purse was involved," the Court treated it as a "special factor" which counseled against implication of a damage remedy. *Bivens, supra,* 403 U.S. at 397. The instant case does not present a question of judicial creation of an action for the benefit of the United States. Thus, no such considerations of "federal fiscal policy" are relevant.

ty of actions taken by civilian federal officials against civilian federal employees. Indeed, it requires no citation to state that a large portion of the work of the federal bench consists of reviewing the constitutionality of actions taken by civilian officials of the federal government.

A decision by this Court to permit Bush to sue Lucas individually for a constitutional tort would not, therefore, foreclose the possibility that in cetain limited circumstances a *Bivens* remedy would not be available to some federal employees. These circumstances, however, do not warrant a blanket prohibition on *Bivens* actions against federal officials who have used their positions to invade the constitutional rights of federal employees. The lower court, in imposing a blanket prohibition on *Bivens* suits by Bush and all federal employees, failed to examine the "special factors" limitation under the standards established by this Court and with the care and precision necessary where fundamental First Amendment values are at stake.

D. The Civil Service Remedies Available To Federal Employees For Violations Of Their Rights Under Federal Employment Statutes Are Not Alternative Remedies Which Congress Has Explicitly Declared To Be Substitutes For Recovery Directly Under The Constitution, And Which Congress Viewed As Equally Effective.

Except to hold that the government as employer should have exceedingly broad latitude in handling its "internal" affairs, the Fifth Circuit discussed no "special factors" other than the statutory remedies available to federal employees under the civil service laws. Instead of applying the limitations on *Bivens* actions established by this Court, the Fifth Circuit applied its own hybrid limitation on such

actions. In so doing, the Fifth Circuit treated statutory remedies as "special factors" and applied a significantly less demanding standard of adequacy to those statutory remedies than this Court has required when constitutional values are at stake.

The availability of alternative remedies is an entirely distinct limitation on a *Bivens* action, one which must be judged by the rigorous standards laid down by this Court. The court below thought itself free to avoid the question of the sufficiency of the available remedies, but at the same time to rely almost exclusively on their very availability. In this reasoning, the lower court erred.[4]

This Court has repeatedly stated that statutory remedies are to be limitations on *Bivens* actions only when "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson, supra,* 446 U.S. at 18, 19 (emphasis the Court's). When statutory remedies fail to meet this standard, as they did in

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[4]We submit that the court below did in practical effect hold that the statutory remedies under the civil service laws were a sufficient substitute which Congress intended to pre-empt the constitutional cause of action. Its decision repeatedly emphasizes the "comprehensiveness of the legislative and statutory scheme" which Congress, through a "process of fine-tuning," has "painstakingly established." *Bush, supra,* 647 F.2d at 576-577. It is clear that the lower court believed these statutory remedies to be the product of a carefully considered balancing of efficiency and pesonal liberty by Congress. It is also clear, moreover, that this belief is the real rationale for the lower court's decision. The court below thus answered the question which it stated it did not reach: "whether Congress intended the civil service remedies to be an equally effective substitute for a *Bivens* remedy." *Id.* at 577. The question whether Congress in fact intended the civil service remedies to be a substitute for a *Bivens* remedy is therefore properly before this Court. A remand to the lower court would serve no useful purpose, and would unnecessarily prolong the already delayed resolution of this case.

Davis[5] and *Carlson,* they have no force as a bar to a *Bivens* cause of action. A statutory remedy either meets the requirements established in the decisions of this Court for pre-empting *Bivens* actions, or it does not. Where it does not, it cannot sneak back into the case as a "special factor" and deprive the victim of a constitutional violation of an effective remedy against a federal offical who has used his authority to violate the victim's fundamental rights.

We respectfully submit that under the standards set by this Court in *Bivens, Davis* and *Carlson,* it is impossible to conclude that Congress intended the civil service remedies available against the government to pre-empt suits for damages against individual officials charged with violations of a federal employee's constitutional rights.

The two most telling arguments may be simply stated. First, the statutory remedies available to federal employees for improper employment practices are remedies against the *United States or its agencies;* they are emphatically not remedies against *individuals* who have committed violations of federal employees' rights. None of the statutory remedies available to federal employees provide any form of relief from the wrongdoers themselves.[6] Second, the statutory remedies available to

[5]In *Davis,* the Court analyzed whether Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, was an "*explicit* congressional declaration that persons in petitioner's position injured by unconstitutional federal employment discrimination 'may not recover money damages from' those responsible for the injury." 442 U.S. at 246-247 (emphasis the Court's) (citations omitted).

[6]The question of the effectiveness of a remedy as a deterrent to unconstitutional action is, as this Court has recognized, central to the proper resolution of whether an implied right of action is necessary. *Carlson, supra,* 446 U.S. at 19. In an organization as large and hierarchical as the federal government, it is unlikely that any remedy which does not ultimately reach the individual wrongdoer will be effective. Instead, the individual wrongdoer might conclude that civil service remedies, such as reinstatement and back pay, are a small price to pay for the suppression, in Bush's case, of information regarding gover-

federal employees are founded upon statutory, merit system principles, not upon rights guarded by the Constitution. Though they will at times overlap, the focus of these statutory remedies is necessarily more constricted than the focus of a *Bivens* remedy.[7] Whatever the adequacy of these statutory remedies to provide protection against violations of civil service statutes and administrative rules,[8] these remedies were neither meant to provide, nor are they structurally capable of providing, full protection against violations of *constitutional* rights.

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ment waste. Certainly, the civil service remedies are incapable of providing any deterrent whatsoever if individual wrongdoers are in fact *rewarded* for their illegal conduct. It is thus highly instructive that Lucas, the defendant in this case, was awarded a bonus of $20,000 under the Senior Executive Service program in 1980, *after* the Civil Service Commission had determined that Bush was demoted in retaliation for the exercise of his First Amendment rights. See Sinzinger, *Liberties For Some, Federal Times,* Vol. 17, No. 40, p. 2, col. 2 (November 30, 1981).

[7]This Court has recognized, albeit in a different context, that distinctly separate rights are "not vitiated merely because both were violated as a result of the same occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respective forums." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 50 (1974).

[8]While we do not claim that a *Bivens* remedy is the sole remedy available to federal employees who have been demoted in retaliation for the exercise of their constitutionally protected free speech, it is significant that the effectiveness of civil service remedies has been called into question by qualified authorities. See *Schroeder Calls For Abolition of MSPB Office of Special Counsel,* 964 GERR 5 (May 24, 1982). Representative Schroeder, a member of the House civil service subcommittee which formulated the Civil Service Reform Act, and now the subcommittee's chair, maintained that the MSPB Office of Special Counsel is "a fraud on the American taxpayer" which "is not doing the job that Congress gave it, to fight waste, fraud, and abuse." *Id.* She also noted that since June 1981 "No disciplinary actions have been sought against managers committing prohibited personnel practices." *Id.* Criticism of the effectiveness of civil service remedies has also come from the bench. See *Wren v. Merit System Protection Board,* 681 F.2d 867, 875 (D.C. Cir. 1982).

The most thorough analysis of alleged statutory substitutes for *Bivens* remedies is found in this Court's decision in *Carlson v. Green, supra. Carlson* originated as a suit brought by the estate of a deceased federal prisoner, alleging that federal prison officials had engaged in unconstitutional conduct which resulted in the prisoner's death. 446 U.S. at 46. An action for damages against the United States could have been brought under the Federal Tort Claims Act. Instead, the estate sought to bring a *Bivens* action directly under the Constitution against the individual federal officials who had violated the prisoner's constitutional rights. The Court in *Carlson* was thus presented with the question which is now before it: whether a *Bivens* cause of action is available against individual federal officials when the same facts would sustain a statutory cause of action against the United States.

In the course of resolving this question in favor of an implied right of action under the Constitution, the Court first asked whether anything in the statute or its legislative history showed "that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Id.* at 19. An affirmative showing of such intent was required; the burden of producing this affirmative showing, moreover, was squarely placed on the federal officials who sought to avoid personal liability. In its not sufficient, therefore, for federal officials to show that a statute does not specifically preserve a *Bivens* remedy. On the contrary, in the absence of indicia of Congress' intent to pre-empt or displace a *Bivens* remedy, a cause of action directly under the Constitution remains available against individual federal officials.[9]

[9]The significance of the lower court's error in casting the issue in this case as one of "special factors" becomes especially evident when the question of congressional intent is considered. When a case turns on "special factors counseling hesitation in the absence of affirmative action by Congress," *Bivens, supra,* 403 U.S. at 396, it is the *absence* of an explicit congressional statement which leads the court to refuse to provide a *Bivens* remedy; when a case turns on a congressionally

An examination of the statutes relevant to this case[10] reveals nothing which indicates that Congress intended these statutes to "replace, rather than to compliment, the *Bivens* remedy." *Id.* at 19, n.5. In addition, there is nothing in either the relevant statutory language or legislative history which indicates that Congress regarded

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provided substitute remedy, on the other hand, the court must find *positive evidence* of an *affirmative congressional intent* to create a statutory alternative. The lower court has thoroughly inverted this analysis. Contrary to the principles laid down by the Court in *Bivens, Davis* and *Carlson,* the lower court inferred "special factors" from Congress' intent to provide civil service remedies to improperly demoted federal employees. Instead, it should have inferred from Congress' silence that it did *not* intend to pre-empt the *Bivens* remedy.

[10]The civil service remedies available to federal employees are established in the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), codified at 5 U.S.C. § 2301 *et seq.*, and the administrative rules promulgated thereunder. See 5 C.F.R. 1.1 *et seq.*

Under these statutes and regulations, a federal employee may not be subjected to an adverse personnel action as a reprisal for:

"(A) a disclosure of information . . . which the employee or applicant reasonably believes evidences –

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to the public health or safety.

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8).

A federal employee who suffers an adverse personnel action in violation of this Section may submit a complaint to the Special Counsel of the Merit Systems Protection Board (MSPB), which is authorized to investigate allegations of prohibited personnel practices. 5 U.S.C. § 1206(a)(1). The Special Counsel has discretion to file an order for corrective action with the MSPB. 5 U.S.C. § 1206(c). A nonprobationary employee may also independently pursue an appeal to the MSPB under 5 U.S.C. § 7701.

When the MSPB finds that an employee has been the victim of a prohibited personnel practice, it may award reinstatement and back pay, not damages. See 5 U.S.C. § 1205. See also 5 U.S.C. § 5596, 5 C.F.R. 550.801-807.

these civil service remedies as equally effective remedies for *constitutional* violations. *Id.* at 19.

There are, furthermore, several indications that Congress did not mean to displace *Bivens* remedies. Three of these factors were present in *Carlson* as well, "each suggesting that the *Bivens* remedy is more effective" and giving support to the Court's conclusion "that Congress did not intend to limit respondent to [a statutory] action." *Id.* at 2021. First, as the Court in *Carlson* emphasized, "the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. See *Butz v. Economou,* 438 U.S. 478, 505. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent" than a remedy available only against the United States. *Id.* at 21. The deterrent value of a particular remedy is greatly enhanced by the threat of damages, "surely particularly so when the individual faces personal financial liability." *Id.* Civil service remedies are thus "much less effective than a *Bivens* action as a deterrent to unconstitutional acts." *Id.* at 22.

Second, the Court in *Carlson* noted that punitive damages "may be awarded in a *Bivens* suit." *Id.* See *Carey v. Piphus,* 435 U.S. 247, 257, n.11 (1978); *Butz v. Economou, supra,* 438 U.S. at 504. Punitive damages are, of course, not available to federal employees under any statutory remedy for improper employment practices. More critically, however, the civil service remedies do not provide even full *compensatory* damages. A federal employee dismissed or demoted because of unconstitutional conduct by a federal official can obtain only reinstatement and back pay. Other real damages, such as pain and suffering, additional loss of income, and out-of-pocket expenses, are not compensable under any civil service remedy. These remedies, therefore, do not provide even minimally adequate compensation for the actual losses which may be suffered by a federal employee whose constitutional rights have been violated.

Third, juries are not available to plaintiffs in a civil service action, as they would be in a *Bivens* suit. *Id.* Petitioners in *Carlson* argued that this difference was not significant, since juries, they claimed, have been biased against *Bivens* plaintiffs. *Id.* In response, the Court noted that petitioners did not assert that judges trying the statutory claims would be any more receptive than *Bivens* juries, and that petitioners "cannot explain why the plaintiff should not retain the choice" to have the factual elements of the claim and the amount of damages decided by a jury. This same factor deserves equal weight in the instant case.

There are additional reasons for finding that the civil service remedies available to federal employees are not as effective as a *Bivens* remedy. Many unconstitutional acts which would sustain a *Bivens* claim cannot be remedied at all through a civil service proceeding. No civil service remedies are available, for example, for unconstitutional acts of false imprisonment, privacy invasion, conversion, or false arrest. The fact that the civil service statutes do not provide any remedies for these constitutional violations, which could be remedied through a *Bivens* action, is a clear indication that Congress did not contemplate displacement of preexisting *Bivens* rights when it provided civil service remedies for improper federal employment practices. Further evidence of Congress' intent not to displace preexisting *Bivens* remedies for federal employees is found in the fact that no mention of such intent is contained in the Civil Service Reform Act which was enacted nearly a decade after *Bivens* was decided.[11] If Congress

[11]The legislative history of the Civil Service Reform Act of 1978, codified at 5 U.S.C. § 2301 *et seq.*, leaves no doubt that Congress sought to achieve two objectives with the enactment of that legislation. First, Congress sought to improve the performance and efficiency of the federal service. Second, Congress sought to increase the protection of certain employee rights. These twin goals were stated in President Carter's message to Congress on March 2, 1978: "The objectives of the civil service reform proposals I am transmitting today are:

had meant the civil service remedies to "replace, rather than to complement," *Bivens* actions it could easily have said so. The fact that Congress was silent on this point lends strong support to the conclusion that Congress did not regard its civil service reforms as an equally effective substitute for direct recovery against individual federal officials under the constitution. In no event can that silence be read implicitly to pre-empt the *Bivens* remedy; this Court has said that such an intent must be "explicit." *Carlson v. Green, supra,* 446 U.S. at 19. At the very least, a positive showing of congressional intent is required to foreclose a *Bivens* action. No such showing is possible here.[12]

To strengthen the protection of legitimate employee rights; To provide incentives and opportunities for managers to improve the efficiency and responsiveness of the Federal Government; To reduce the redtape and costly delay in the present personnel system; To promote equal employment opportunity; To improve labor-management relations." H. Rep. No. 95-1403, 95th Cong., 2d Sess. 3 (1978), *reprinted in* I House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Civil Service Reform Act of 1978 at 640 (1979) (hereinafter "Legislative History"). It is thus clear that the Civil Service Reform Act was meant to increase the protection of certain employee rights, including "whistleblowing." See II Legislative History at 1607, 1633, 1680, 1725. But nowhere in the legislative history, nor indeed in the legislation itself, is there any indication that Congress meant to deprive federal employees of the right to seek damages against individual federal officials directly under the Constitution. The Civil Service Reform Act establishes a proscribed route for relief from the federal government for prohibited personnel practices; in contrast, a *Bivens* remedy provides relief from the offending *individual* for *constitutional* violations. Nothing in the Civil Service Reform Act or its legislative history reveals an intention to close the door to federal employees seeking a *Bivens* remedy.

[12]Additional evidence that Congress did not mean to displace a *Bivens* remedy is found in the following passage from the House Report, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 386, *reprinted in* I Legislative History 760:

> Right now, a Federal employee who "blows the whistle" (sometimes even to a congressional committee) on activities at his agency which are a violation of law, mismanagement, abuse of authority, waste of funds or a

For the above reasons, it cannot be maintained that the remedies available to federal employees for violations of their civil service rights were meant to be an equally effective substitute for recovery directly under the Constitution for violations of *constitutional* rights.[13]

> danger to the public may be more likely to be harassed or fired than praised or rewarded. *There is no effective means other than drawn out administrative and court proceedings for a whistleblower to set things right.* We all lose when reasonable and constructive criticism of agencies by those who know them best is stifled.
>
> (Emphasis added).

As this passage demonstrates, Congress probably did not even consider the possibilities of a *Bivens* remedy when it enacted the Civil Service Reform Act. It is thus impossible to conclude that Congress *intended* civil service remedies to be a substitute for a *Bivens* action or that it considered those to be as effective as a *Bivens* remedy. What is clear is that Congress sought to provide protection for federal employees who make good faith criticisms of waste in the federal government. It requires a Herculean leap, however, to conclude that because Congress was moved to provide some civil service protection it therefore intended to foreclose the possibility of direct relief under the Constitution against individual wrongdoers.

[13]The decision of this Court in *Brown v. General Services Administration*, 425 U.S. 820 (1976), does not indicate otherwise. In *Brown*, the Court held that Section 717 of the Civil Rights Act of 1964 provides the exclusive remedy for claims of discrimination in federal employment. *Id.* at 821. *Brown*, however, did not treat the question of a statutory versus a constitutional remedy. Nor did *Brown* treat the question of a remedy against the United States versus a remedy against individual federal officials. In contrast to the present case, *Brown* was concerned only with which statutory remedy would be available to the plaintiff. The principles guiding the Court's decision in that case, therefore, have no application here. See *Brown, supra*, 425 U.S. at 834. "In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." See also *Id.* at 835. "We have consistently held that a narrowly tailored employee compensation scheme pre-empts the more general tort recovery

E. Neither Government Efficiency Nor Scarce Judicial Resources Will Be Compromised By Permitting Federal Employees To Vindicate Their Constitutional Rights In Damage Actions, Since The Qualified Immunity Doctrine Will Prevent Suit In All But The Most Egregious Instances Of Intentional Invasion Of Clear Constitutional Rights.

The lower court repeatedly emphasized its concern with governmental efficiency and its fear that permitting federal employees to bring *Bivens* actions would tend to compromise that efficiency. *Bush, supra,* 647 F.2d at 576, 577. NTEU does not argue that the efficient operation of the federal government is an illegitimate concern. On the contrary, the benefits of an efficient federal service are obvious to anyone concerned with the national welfare. Efficiency, however, cannot be obtained at any price. The fundamental rights of the people, including those people who work in the national interest, must be respected. Above all, those rights which the Constitution guarantees against infringement by the government cannot be sacrificed in the name of governmental efficiency. In those cases where efficiency and fundamental constitutional rights come into conflict, efficiency must give way.

This case, however, presents no such conflict. By its decisions in *Butz v. Economou*, 438 U.S. 478 (1978), and

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statutes." (Emphasis added.) In *Brown*, therefore, the Court had no occasion to consider the questions presented in the instant case. For this reason, the Court in *Brown* did not engage in the analysis of statutory schemes which it has held to be required in the context of a *Bivens* claim. See *Carlson v. Green, supra,* 446 U.S. at 19-21, *Davis v. Passman, supra,* 442 U.S. at 1246-247. It is highly significant that neither the decision of the Court, written by Justice White, nor the dissenting opinion filed by Justice Stevens and joined by Justice Brennan, contains any reference to *Bivens* or its progeny. The issues raised in *Bivens* and its progeny, and authoritatively answered there, were simply not relevant to the issues resolved in *Brown*. Similarly, the issues raised and decided in *Brown* are not relevant to the questions now before the Court.

Harlow v. Fitzgerald, 50 U.S.L.W. 4815 (June 22, 1982), this Court has carefully balanced the nation's legitimate concern with governmental efficiency against the important value of providing redress for the violation of constitutional rights by federal officials. The resulting balance is the doctrine of qualified immunity. Under this doctrine, "government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra*, 50 U.S.L.W. at 4820.

Although the specific issue addressed in *Harlow* was different from the one presented here, *Harlow* is strikingly similar in several important respects to the case now before the Court. In *Harlow*, dismissed federal employee A. Ernest Fitzgerald sued federal executive officials for conspiracy to violate his First Amendment rights. Specifically, Fitzgerald alleged that these federal officials had conspired to dismiss him from the federal service after they learned "that Fitzgerald planned to 'blow the whistle' on some 'shoddy purchasing practices' by exposing these practices to public view." *Harlow, supra*, 50 U.S.L.W. at 4816. The defendant federal officials argued that suit could not be brought against them because they were entitled to absolute immunity. *Id.* at 4817. The result of granting such immunity would have been the insulation of federal officials from suits brought by persons in Fitzgerald's position: federal employees who have been subjected to administrative penalties for exercising rights guaranteed by the First Amendment. The Court in *Harlow*, however, refused to make this result the law of the land. *Id.* at 4818-4820.

The question of governmental efficiency was explicitly raised, considered and factored into the Court's decision. *Id.* at 4820. The Court concluded, moreover, that con-

siderations of efficiency were not sufficient to warrant a bar to Fitzgerald's First Amendment tort claims. *Id.* Justice Powell's decision for the Court emphasized three elements which supported the Court's conclusion that the defendants were not absolutely immune from Fitzgerald's First Amendment suit. First, the Court emphasized that the doctrine of qualified, or "good faith," immunity would prevent all but the most egregious, intentional constitutional violations from proceeding to trial. *Id.* at 4819. The Court explained that:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* [*v. Rhodes,* 416 U.S. 232 (1974)] that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.
>
> *Harlow, supra,* 50 U.S.L.W. at 4817, *quoting Butz v. Economou, supra,* 438 U.S. at 507-508.

Thus, efficiency in the government was held to be adequately served by providing federal officials with qualified immunity and not to require a total bar to Fitzgerald's tort claims under the First Amendment. Although the Court remanded the case for a consideration of the issue presented here – whether the federal employee stated a legally sufficient cause of action under *Bivens* – it is inconceivable that the Court would allow further account to be taken on remand of the need for government efficiency. The Court has already considered that concern

fully in its original immunity decision. *Harlow, supra,* 50 U.S.L.W. at 4821, n. 36.

Second, the Court in *Harlow* recognized that "[d]amages actions against high officials were . . . 'an important means of vindicating constitutional guarantees'." *Id.* at 4818, *quoting Butz, supra,* 438 U.S. at 506. In this regard, the Court noted that the greater the power of federal officials, the greater the potential for abuse. We submit that the power of federal officials is perhaps greatest when exercised in the context of authority over lower level federal employees, as the *Harlow* case itself illustrates. The Court also noted that in holding higher ranking federal officials not absolutely immune for constitutional torts to lower level federal employees such as Fitzgerald, it did not mean any "disparagement of the offices" held by such officials. *Id.*

Third, the Court made the significant point that "where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.* at 4820. A federal official should not hesitate any less where the constitutional rights to be intentionally and knowingly trespassed are those belonging to a member of the federal service.

It is clear then that federal officials will not be liable for constitutional violations committed against federal employees unless the official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action *with the malicious intention* to cause a deprivation of constitutional rights . . ." *Id.* at 4819, *quoting Wood v. Strickland,* 420 U.S. 308 (1975) (emphasis the Court's). This standard is sufficient to provide adequate protection to the nation's interest in government efficiency and the interest of federal officials in avoiding harassment or

liability for their unknowing or non-malicious mistakes. The qualified immunity doctrine should also prevent unwarranted expenditure of scarce judicial resources, particularly at the appellate level, where such scarcity is most acute. The lower court thus erred when it held that considerations of government efficiency required the prohibition of *Bivens* suits by federal employees seeking to vindicate their constitutional rights against abuse by federal officials.

The lower court also erred in holding that recognition of a *Bivens* remedy for federal employees would encourage those employees to bypass the civil service statutes in favor of direct judicial relief. *Bush, supra,* 647 F.2d at 577. As the facts of the present case make clear, aggrieved employees will pursue civil service remedies, as they must, to obtain reinstatement and back pay, even when a *Bivens* remedy is available against individual federal officials. A *Bivens* suit against an individual federal official cannot result in reinstatement. Nor can a civil service suit against the government result in damages. These remedies are distinct and different; they serve different purposes and reflect different values. The lower court, however, failed to recognize and appreciate these differences. As a result, the court below came to the erroneous conclusion that permitting federal employees to seek damages against individual federal officials for constitutional violations would discourage pursuit of completely distinct civil service remedies. Bush's actions in this proceeding indicate otherwise. There is, indeed, no reason to believe that aggrieved federal employees would not actively pursue all avenues of redress, including the important civil service remedies of reinstatement and back pay. A decision for

Bush in this case would not, therefore, in any way undermine the remedies created by Congress for improper employment practices.[14]

[14]We cannot comprehend the lower court's reasoning that a *Bivens* remedy for federal employees "would provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved federal employee can protect his rights." *Bush, supra,* 647 F.2d at 577. By such reasoning, no cause of action should ever be judicially created, including that recognized in the *Bivens* decision, since its very effectiveness provides a disincentive for further congressional action. This Court, however, has emphatically rejected the notion that the power to authorize damages as a remedy for the vindication of a constitutional right lies exclusively in Congress. See *Bivens, supra,* 403 U.S. at 401-406 (Harlan, J., concurring). Where constitutional rights require protection, the judiciary cannot sit on its hands for fear that providing such protection would act as a disincentive for Congress to do so itself.

CONCLUSION

The judgment of the Fifth Circuit should be reversed and remanded with instructions to permit Bush to proceed to trial on his *Bivens* claim against Lucas.

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